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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 615

JOHN J. DIETZ,
Petitioner,

vs.

CITY OF TOLEDO, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio.

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To The Supreme Court of Ohio.

Petitioner herein, John J. Dietz, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on June 30, 1965.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 3 Ohio State 2d beginning at page 30. It is also reported in the July 5, 1965 issue of the Ohio Bar. The opinion is printed in the Appendix hereto.

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Ohio was entered as of June 30, 1965. There was no motion for a rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) and this Court's Rule 22 (1), inasmuch as the Ohio courts have denied the petitioner rights and privileges guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

Is a person under arrest deprived of rights guaranteed by the Constitution of the United States by the repeated refusal of the police to permit him to contact his lawyer for advice prior to submitting to interrogation and physical examination?

Can the police authority constitutionally condition the right to have counsel on the prisoner first submitting to such interrogation and physical examination?

Can the police authority refuse a prisoner access to counsel until after he has submitted to interrogation and examination and has been booked?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are that portion of the 5th Amendment to the Constitution of the United States which reads in part:

> "* * * Nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor * * *."

And that portion of the 6th Amendment to the United States Constitution which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy * * *, and to have the assistance of counsel for his defense."

And that portion of the 14th Amendment to the United States Constitution which reads as follows:

> "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE.

The petitioner, John J. Dietz, is a business man who resides in a small village approximately twenty miles south of Toledo. The arrest which gave rise to this case was the first time in his life that he had been in the custody of the police.

His arrest followed a minor accident in the City of Toledo when his automobile struck a warning cone placed in the street to channel traffic around a repair zone. After receiving emergency treatment at a nearby hospital, he was taken by police to the Traffic Bureau at the City Jail where he was immediately taken to the interrogation room for questioning.

The record is undisputed that Mr. Dietz made a request of the police officers to allow him to contact his lawyer as soon as he entered the room and prior to his interrogation. There is no dispute that this request was denied.

Nor is there any dispute that Mr. Dietz again requested that he be allowed to call his lawyer when subsequently directed to take the chemical test known as the Harger Drunkometer. This request, as were others, was refused.

The examining officers, the Record reveals, not only refused to permit Mr. Dietz to contact his lawyer, but were of the opinion that he had absolutely no right to contact his lawyer to obtain legal advice *until after he was charged and booked into the jail.* (R. 4, Col. 2.)

After it became obvious that he would not be permitted to call his lawyer, and with the promise that if he submitted to the test, he would then be allowed to call his lawyer, he was cajoled into taking the test upon the advice of the officers, both with respect to his legal rights and the operation of the testing device.

As the direct result of the interrogation and examination, the police placed a charge of driving under the influ-

ence of alcohol against the petitioner. Parenthetically, we point out that the petitioner was taken into custody without a warrant, the offense charged not having been committed in the presence of the arresting officers, and any evidence to support the subsequent charge of driving under the influence came into the possession of the police as the result of the interrogation and tests and after the petitioner was refused counsel.

Despite the representations made to the petitioner by the police officers, he was not permitted to contact his lawyer *after* he submitted to the questioning and the test or after he was booked. Instead he was immediately placed in a cell from which, according to a sanctioned rule of the Toledo Police Department, he was not entitled to bail for a period of at least four hours. (That such a rule is in effect is not in dispute. See page 27, Dissent of Judge O'Neil, Appendix, *infra.*)

The petitioner's experience, as appears in the testimony at pages 5 and 6 of the Record, was the basis for a motion at the beginning of his trial and prior to the introduction of any evidence to exclude all testimony relating to the test and to all testimony relative thereto. (R. 1.) This motion was overruled, and at the conclusion of the case, Mr. Dietz was found guilty of driving while under the influence of liquor and sentenced to three days in the Toledo House of Correction and fined $25.00 and costs.

Subsequent thereto, successive appeals were taken through the lower courts. The Supreme Court of Ohio, after granting the petitioner's motion to certify the Record, affirmed the decision of the Municipal Court of Toledo.

The Record which was before The Supreme Court of Ohio consisted of only 6 pages. It contained the essentials to demonstrate the constitutional questions involved there and here. The facts which form the basis for these ques-

tions are meagerly alluded to in the majority opinion of The Supreme Court of Ohio, the Court being content to bottom its decision on the conclusion that the petitioner's denial of counsel did not violate that portion of Section 2935.14 of the Ohio Revised Code which, as set out in the Court's opinion, provides as follows:

> "If the person arrested is unable to offer sufficient bail * * * he shall * * * be speedily permitted facilities to communicate with an attorney-at-law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel."

Facts Relating to Questions Presented Here.

The following testimony of Sergeant Cook of the Toledo Police Department, the interrogator and testor, and the petitioner, discloses the procedure used in this arrest and, without doubt, the procedure customarily employed by Toledo police (R. 4):

Testimony of Sgt. Cook.

(R. 4, Col. 2 at Tr-120.)

"Q. When Mr. Dietz first came in isn't it true that he asked to call his attorney? A. I questioned him, I believe I asked him his name and age and if he'd been driving an automobile, and I believe at that time that's when he requested to call his attorney.

Q. And you suggested to him that you would not permit him to do it for the reason that you felt that it wasn't important at this time? A. That's right.

Q. In other words, you said he had a right not to answer the questions if he didn't want to? A. That's right.

Q. Consequently he didn't have to call his attorney? A. No, sir.

Q. Did it ever occur to you, sir, that he may have had a right to call his attorney? A. No, it didn't.

Q. Are you aware of the fact that there's a statute in the State of Ohio which commands the arresting officer or the officer having custody of a defendant to permit him to contact not only an attorney but anyone he wishes to contact? (Tr-121.) A. Not until they were booked, that was my understanding. That's the only thing I ever knew.

Q. In other words, in your opinion you could interrogate the witness as long as you want to and get any information you want to from him in cognitio without being able to contact anyone—excuse, me, I meant in communicato without being able to contact anyone just as long as soon as he was booked he could call his attorney? A. That's right.

Q. That's your understanding of the law? A. Yes, sir.

Q. How many times did he ask to contact his attorney? A. Twice.

Q. And did he ask prior to taking the drunkometer? A. Well, after discussing it he asked to call his attorney and I again told him that it wasn't necessary, that he didn't have to take the test, it was strictly voluntary on his own part.

Q. Did it ever occur to you that his attorney may have told him to either take the test or not take the test? A. No, I didn't give that thought.

Q. Did it ever occur to you that maybe Mr. Dietz never had a drunkometer test before and was absolutely unacquainted with the drunkometer? A. No, I didn't know.

Q. You didn't know that he never had a drunkometer test before? (Tr-122.) A. No, sir.

Q. Did it ever occur to you at the time that his attorney may have had a greater knowledge of a drunkometer and its validity then Mr. Dietz? A. Well, I probably would, yes, I suppose I would.

Q. Did it occur to you at the time that maybe this was, that Mr. Dietz knew this and was attempting to contact his attorney to determine whether or

not he should take the test? A. I didn't ask him that, sir. I don't know."

* * * * *

Testimony of John J. Dietz.

(R. 5, Col. 2.)

"A. The sergeant asked my name, age, and several other questions. At that time he told me he was going to ask me to take the drunkometer test, however, I didn't have to take it, that if I did take it and it showed that I had not been drinking, that if I had not been drinking in the last four hours, that it would be a lot easier on me. I said, "Well, before I do that, I would like to call my attorney. I would like to let him advise me. I've never been booked for any violation. I want to know what to do." And he said that they are much too busy to permit me to go to the telephone. I said, "The phone is just around the corner," which I noticed it was around the corner on the wall, when I came in. I said, "I've got money." I said, "If Mr. Green is not in or his father is not there to give me advice, I will take the examination right now." He said, "No, we just don't have the time for that." And one officer standing there said, "John, if you are sure you have not had a drink for four hours, you have absolutely nothing to worry about." I said, "I am not certain about that. It is a fact I did have a shot of novocaine (Tr-233) while I was in the hospital. I wonder if that would affect the results of the test." And he said, "No." So I said, "Why can't I call my attorney and find out?" He said, "We are too busy. You can call after you take the test." He was getting a little determined about it at the time so I agreed to take the test.

Q. Subsequent to your taking the test what happened? A. Before I took it?

Q. After. A. I took the test, then all the questions and everything stopped and they wrote down the figure and then the first officer took me to the

other room. I said, "Well, gee, can't I call now?" He said, "I have no jurisdiction. You are in another department." They took me into a room and took all my money, everything, and put me in the cell.

Q. Did you say anything when you went to the cell? A. I said, "Can't I at least call my wife if you don't want me to call an attorney? Let me call my wife." He said, "I am sorry, John." He called me John. He said, "I am sorry, I have no authority in this department."

It was not until some time after the petitioner was placed in a cell and during the four hour no-bail period that one of the police officers, "out of the kindness of his own heart," apparently called the petitioner's brother to advise him of his whereabouts. (R. 3.)

Apropos of the need for legal advice from someone other than a police officer is the fact that in Ohio the refusal of a person to submit to a chemical test such as the one under consideration here can be the subject of permissible testimony by the police[1] and under such circumstances subject to comment by the prosecuting attorney.

HOW FEDERAL QUESTION PRESENTED.

The question regarding the deprivation of the defendant's right to counsel protected by the United States Constitution was raised initially by his motion to suppress the evidence of the Harger Drunkometer which was filed prior to the defendant's trial in the Toledo Municipal Court. The issue was argued at this time and defendant's counsel objected to the introduction of the evidence of the drunkometer during the trial.

During the subsequent proceedings the question of the deprivation of counsel guaranteed by the United States

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[1] *State of Ohio v. Nutt*, 78 Ohio App. 336.

Constitution was presented, briefed and argued in all the appellate courts. The opinion of the Ohio State Supreme Court specifically states that this issue was considered by that court. 3 O. S. (2d) 30, 31, 33.

REASONS WHY THIS WRIT SHOULD BE GRANTED.

The facts of this case present this Court with a unique opportunity to resolve with finality the perplexing problems that have plagued the Bench and Bar of the nation since the announcement of its decisions in *Gideon vs. Wainwright*, 372 U. S. 335 (1963); *Massiah vs. The United States*, 377 U. S. 201 (1964) and *Escobedo vs. The State of Illinois*, 378 U. S. 478 (1964).

At the time Mr. Dietz stood trial in the Toledo Municipal Court on January 23, 1962, his right to counsel as expressed by the United States Constitution was obscured by a number of unresolved issues. During the intervening years while the case was argued in the appellate courts of Ohio, this Court has delimited the issues involved in this case to a single and narrow question.

There is no longer any question that the right to counsel as expressed in the Sixth Amendment of the United States Constitution and defined by this Court are applicable to criminal proceedings before State as well as Federal courts. *Gideon vs. Wainwright, supra; Massiah vs. The United States, supra; Escobedo vs. The State of Illinois, supra,* and *Pointer vs. The State of Texas,* 380 U. S. 400 (1965). Moreover, it seems firmly decided that any incriminating evidence garnered from a defendant subsequent to the denial of his constitutional right to counsel may, upon proper motion, be excluded from the trial of a criminal case in a state court regardless of its probative value and without regard to whether or not the evidence was given voluntarily or involuntarily. *Mapp*

vs. The State of Ohio, 367 U. S. 643 (1961); *Gideon vs. Wainwright, supra; Massiah vs. The United States, supra,* and *Escobedo vs. The State of Illinois, supra.*

The only legal issue presented by the facts of this case, therefore, is whether the defendant was denied his right to counsel as defined by the Sixth Amendment to the United States Constitution. The issue may be further refined by assuming, academically, that had the defendant incriminated himself without benefit of counsel after he had been indicted or during a pretrial hearing at which his plea was taken or statements made which could otherwise be used against him in a subsequent criminal trial, such evidence would be subject to the exclusionary rule of this Court, again regardless of the probative value of the evidence or without regard to whether it was voluntarily obtained. *White vs. The State of Maryland*, 373 U. S. 59 (1963); *Hamilton vs. The State of Alabama*, 368 U. S. 52 (1961); *Massiah vs. The United States, supra,* and *Pointer vs. The State of Texas, supra.*

However, there is in the minds of many courts, as well as prosecutors and defense attorneys, serious questions, doubts and confusion as to a defendant's absolute right to counsel, at least where counsel is requested, during the inquisitory period immediately after arrest but prior to his indictment or appearance at a preliminary hearing where his future liberty might innocently and ignorantly be squandered by an absence of legal judgment. *Escobedo vs. The State of Illinois, supra,* has apparently not resolved this question, at least insofar as the minimum limits of the absolute application of the Sixth Amendment is concerned.

Escobedo and the Sixth Amendment as an Absolute Right.

The *Escobedo* case clearly involves the validity of admissions made immediately subsequent to arrest and prior to indictment or pretrial or preliminary hearings. Indeed, if we reflect the facts of our present case into the language of Mr. Justice Goldberg which he considered to be the holding of the Court, the *Escobedo* case would be virtually dispositive of the present case:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus upon a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional rights to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment,' *Gideon vs. Wainwright*, 372 U. S., at 324, 83 Sup. Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (378 U. S. 478 at 490.)

There can be no question that the investigation of the Toledo Police Department had begun to focus upon Mr. Dietz, that he had been taken into police custody, that the investigating officers were carrying out a process of interrogation that lent itself to eliciting incriminating evidence from the defendant, or that the defendant had requested and been denied an opportunity to consult with his attorney.

It is true that unlike the defendant in the *Escobedo* case, Mr. Dietz was advised that he could take the drunkometer test or not as he saw fit, though it is not at all clear

that he was advised that if he voluntarily submitted to the test the results could be used against him in a subsequent trial. It occurs to us, however, that if the right to counsel is to be regarded as absolute, it cannot attach upon the focus of an investigation upon a suspect in police custody after a request for counsel is made only to melt away when he is advised that he may remain silent.

If the need of legal counsel during the investigatory stage of a criminal proceeding gives rise to a right of counsel under the Sixth Amendment, we fail to see how this need is in any way lessened by the gratuitous legal opinion of the police officers. If anything, the statements of legal opinion or advice by an arm of the prosecution should increase rather than diminish the need for legal counsel.[2]

But what is perhaps even more important, even though Mr. Dietz was advised that he could take the test or not as he saw fit, he was *not* advised that the evidence could be used against him in a subsequent criminal action, he was *not* advised that under Ohio law he had an absolute right to consult with his attorney immediately upon being confined (Ohio Revised Code Section 2935.14), and he was *not* advised that if he did not take the test his failure to do so could be introduced at the trial of his case and commented upon by the prosecutor, Constitution of the State of Ohio, Article I, Section 10. (*State vs. Nutt, supra,* 78 O. App. 336.)

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[2] After the expiration of a time allowed by the Supreme Court of Ohio for an application for rehearing, the Legislature enacted Section 2935.20 Revised Code, effective November 1, 1965, which section completely invalidates the position taken in the majority opinion below that even though the petitioner was denied the privilege of conferring with his lawyer, his rights were sufficiently protected when the police officer called his brother after he was booked into a jail cell.

(See Section 2935.20 R. C. in Appendix.)

In view of the legal consequences which flowed from his decision to submit or not to submit to the drunkometer test and the fact that the information obtained was the most important evidence introduced by the prosecutor at his trial, one can hardly deny that his need for legal counsel during these early hours was necessary despite the admonition of the investigating officers that Mr. Dietz need not take the test unless he saw fit to do so.

It seems inescapable that the language of Mr. Justice Goldberg quoted above, when taken together with the preceding paragraphs of his Opinion, implies that the right to counsel is absolute during the period immediately subsequent to the arrest and detention of a defendant and that this right is not tempered by surrounding circumstances, i.e. the age and experience of the defendant, his mental capacity or education, the length of the interrogation or the procedures used. To put it another way, the right to legal counsel as expressed by the Sixth Amendment to the Constitution attaches as soon as a person is taken into custody and an interrogation focuses upon him as a prime suspect in a criminal case and any incriminating evidence which is obtained during this period of time is subject to exclusion at the trial of the defendant's case regardless of the probative value of the evidence garnered and irrespective of whether it was obtained voluntarily or not.

Escobedo and Crooker: Absolute Sixth Amendment Right vs. Qualified Due Process Right.

This view of the right to counsel as an absolute rule requiring the application of the exclusionary rule regardless of the circumstances surrounding the denial of counsel and the extent to which this denial prejudiced the defendant's case is at complete variance with this Court's

earlier rulings in *Crooker vs. California,* 357 U. S. 433 (1958). In the *Crooker* case, as well as its companion case, *Cicenia vs. LaGay,* 357 U. S. 504 (1958), this Court was not prepared to extend the right to counsel as expressed in the Sixth Amendment to the pretrial and investigatory proceedings of a criminal case. Rather, it held that the deprivation of counsel for any part of the pretrial proceedings was one factor to be taken into consideration together with all of the other surrounding circumstances to determine whether or not a defendant was deprived of his right to a fair trial under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

If *Escobedo vs. The State of Illinois, supra,* extends the right of counsel under the Sixth Amendment to those pretrial proceedings immediately after the defendant's arrest and at a period of time when the inquiry has begun to focus upon a particular suspect, then it would seem logical to assume that the rule of law announced in *Crooker vs. California, supra,* and *Cicenia vs. LaGay, supra,* insofar as it affects a defendant's right to counsel in the pretrial stage of criminal proceedings, must be considered to be overruled and the circumstances surrounding the elicitation of the evidence sought to be excluded other than the deprivation of counsel would be wholly irrelevant in determining whether or not a defendant's Sixth Amendment rights have been violated.

However, after announcing what to us appears to be a rather clear and unequivocal extension of the right to counsel to all pretrial proceedings in a criminal case, including the investigatory stage, Mr. Justice Goldberg distinguished the *Escobedo* case and the *Crooker* case, not by comparing the right to counsel under the Sixth Amendment and its extension into the pretrial proceedings of a

criminal case as announced by the recent Opinions of the United States Supreme Court with the earlier due process standard applied by the Court in the earlier cases, but rather distinguished the surrounding circumstances of the *Escobedo* case with the surrounding circumstances of the *Crooker* case. This hint that the *Escobedo* case was decided on the due process principles of *Crooker vs. California, supra,* and *Cicenia vs. LaGay, supra,* rather than upon the absolute right to counsel as expressed in the Sixth Amendment to the Constitution was not entirely clarified by the Court's suggestion that "in any event, to the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded as controlling." 378 U. S. 478 at 492.

But we sincerely believe that the full meaning of the majority opinion must be read as interpreted by Mr. Justice White in his dissenting Opinion:

> "Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional rights announced will depend on whether the accused has retained his own counsel, or has asked to consult with counsel in the course of interrogation. At the very least, the court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. (Citations omitted.)" 387 U. S. 478 at 495.

The Aftermath of Escobedo.

In the wake of the *Escobedo* case, state and federal courts have been plagued with claims of defendants that their constitutional rights had been violated by the absence of counsel during various stages of the pretrial proceedings of their criminal cases. The reports are replete with

hundreds of Federal and State court opinions which have attempted to interpret the *Escobedo* decision. The result seems to be confusion infinitely confounded.

An analysis of these many decisions or an attempt to offer a compilation or categorization of the many factual and legal distinctions drawn by the courts would be a hopeless task and inappropriate in this petition. Suffice it to say that the state courts, as well as the federal circuit courts, are in hopeless confusion in their interpretation of the *Escobedo* case; and what is more distressing is the fact that in almost every appellate decision, there are divisions among the courts.

However, though the issue is not always clearly stated, there is, in many of the opinions, a definite hint of the approach and thinking of the various members of the courts as to the character of the right to counsel either as an absolute right under the Sixth Amendment or as one circumstance to be taken into account in determining whether or not a defendant has been denied due process of law. But regardless of the position taken by the particular judge, and regardless of the outcome of the case, and regardless of whether or not it represents a majority, concurring or dissenting decision, each opinion relies upon the language of the *Escobedo* case for its validity.

The opinion of the Ohio Supreme Court, for example, is somewhat disappointing. We had hoped that the court would confront the *Escobedo* case. Despite the fact that both counsel cited the latter case in their briefs and argued the right to counsel under the Sixth Amendment before the Supreme Court, the majority opinion seems to have studiously avoided even mentioning the case and has preferred to rely upon the argument that the defendant's rights were preserved because the information elicited was voluntarily offered. Judge O'Neil in his dissent, however,

clearly raises the *Escobedo* issue and in his opinion applies it as an absolute right of a defendant during the investigatory stages of criminal proceedings.

Until this Court finally determines that a defendant's right to counsel is absolute under the Sixth Amendment and made obligatory upon the states through the Fourteenth Amendment, the confusion that has begun will continue and will be limited only by the number of manifold factual situations that an arrest can present.

The facts of this case present this Court with an ideal opportunity to resolve the competing interpretations of *Escobedo vs. Illinois, supra.* This case is not infected with the extraordinary moral considerations that must be taken into account when the crime charged is a felony or capital offense. Mr. Dietz stands as the average citizen who occasionally finds himself at bay with society. Certainly the need of legal counsel at his interrogation in the office of the Toledo Police Department was no less important to Mr. Dietz, the outcome of his case, his future respect in the community, as well as that of his family, than was the need of Mr. Escobedo at the time of his arrest.

An Absolute Sixth Amendment Standard Must be Applied.

What we have attempted to do above is to convince the Court that its opinion in *Escobedo vs. The State of Illinois, supra,* is in desperate need of clarification and that it must announce with finality whether or not a defendant is entitled to consult with counsel of his choice immediately after his arrest and confinement. We now turn our attention briefly to the merits of our argument that the right of counsel under the Sixth Amendment must be extended to any defendant immediately after his detention and prior to his interrogation by police officers, particularly when he repeatedly makes a request to consult with his attorney.

We deem it of the utmost importance to begin our argument with an examination of the office of police interrogation in our system of justice. Our system of criminal justice is accusatorial and adversary: The State representing society against the individual. And in this system, the law enforcement agencies are part and parcel of the weapon of the state against the individual. Its function is to investigate and provide evidence against the accused; in no sense is its purpose to protect the rights of the individual against whom the almost unlimited resources of society are arrayed.

The individual on the other hand is left to his own resources, and to protect him, our organic laws have provided certain safeguards to insure the fair consideration of his cause, not the least of which is the right to legal counsel. A serious imbalance in our system of due process is created when a defendant is interrogated incommunicado and denied the advice of counsel.

The defendant in this case was not and is not a hardened criminal. He is an average, intelligent American citizen; yet, he operated at a distinct psychological disadvantage when he was suddenly plucked from a free society and forced into an armed camp.

The very illusions of friendship, the very illusion of fairness which is affected by officers under these circumstances belies the fact that their prime interest is not in protecting the rights of the individual involved, but rather in attempting to build some semblance of trust in order to garner evidence needed for the defendant's conviction. No clearer demonstration of this could be presented than the fact that the officers interrogating this defendant had no compunction about advising him that he would be allowed to make a telephone call to his attorney after the interro-

gation and then placed him in a cell without providing him with that opportunity.

In short, the defendant was dealing with an authoritarian system; a system based upon power and strength, the prime concern of which was not to find the truth, but to garner evidence for the purpose of conviction.

Moreover, not only were the faces and personalities with which he was forced to deal unfamiliar, the very ground upon which he was forced to protect himself was neither friendly nor familiar. The police, on the other hand, were on completely familiar ground. They had the psychological illusion of strength, power and secrecy. They were familiar with the system with which they were operating, and with which Mr. Dietz was completely unfamiliar. They had the advantage of being familiar with and having operated the drunkometer. They had the further advantage of experts who could verify their findings.

What is more important, he could not possibly have known on the basis of his own training, education or judgment, the legal effect that the taking or failing to take the test would have on the subsequent criminal trial; yet the police department had full and free access to their legal advisor, and certainly would not have hesitated to use this source of information should it have been needed, meanwhile keeping Mr. Deitz secluded from friends, family and advice.

Under these circumstances, under circumstances in which a defendant is placed at a distinct and calculated disadvantage, can we say that he is not in the most imminent need of counsel? Can we say that he is not in need of advice from someone who is more familiar with the procedures of criminal law and the procedures of authoritarian systems? To say that counsel was not needed at

this juncture of the proceedings is, we think, ignoring the realities of police interrogation and criminal procedure. Obviously the statements made, the decisions made, and the evidence offered at this juncture of criminal proceedings are the most important offerings made during the entire case. It is during this preliminary stage that the dynamics of the trial against the defendant are determined. It is at this stage that the statements he makes and decisions he draws have the greatest impact.

What good is counsel, once the defendant has been led to give evidence incriminating himself? What good is advice from counsel when that advice is no longer needed? The essence of freedom is the ability to exert a right during the very crisis itself. There can be no substance to the murmurings of reproach after the right has been foredoomed to ineffectiveness. If the right to counsel has any reference to due process of law and the freedom which we now enjoy in America, it has reference and meaning only when the right to counsel and advice is important, and not the sterile, stagnant, formal exercise of that right when advice is no longer needed and when an attorney's services are merely to guide the defendant more easily to his doom.

If the right to counsel is to have effectiveness in the context of the accusatorial and adversary system within a free society, then the Sixth Amendment must include the absolute right of a defendant to consult with legal counsel immediately after his arrest and prior to his interrogation, with the additional proviso that any evidence which may be obtained in violation of defendant's right to counsel under the Sixth Amendment shall be inadmissible at a subsequent criminal trial.

CONCLUSION.

We have attempted to demonstrate that the *Escobedo* case is in dire need of clarification, and that unless this Court finally determines whether or not the right to counsel is an absolute right under the Sixth Amendment or is merely one circumstance to be taken into consideration with all other factors in determining whether the defendant had a fair trial, the court of the civil states and the various federal courts will continue to slosh aimlessly in the confusion that has been left in the wake of the *Escobedo* decision. This case presents an ideal opportunity for the Court to make its position clear as to whether or not the right to counsel in the early pretrial stage of a criminal case is an absolute right guaranteed by the United States Constitution.

For this reason we respectfully urge that the writ be granted.

Respectfully submitted,

MERRITT W. GREEN, II,
Attorney for Appellant.

GREEN & GREEN,
Of Counsel.

APPENDIX.

OPINION OF THE SUPREME COURT OF OHIO.

1. Where a person charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor, contrary to the provisions of a municipal ordinance, voluntarily submits to a "Harger drunkometer test," during a 15-minute investigation at police headquarters, in the absence of any coercion and after being informed that the test is voluntary and that he is not required to answer any questions, there exists no deprivation of rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States or Section 10, Article I of the Constitution of Ohio.

2. Where law enforcement officers communicate with the brother of a person charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor, there exists sufficient compliance with the provisions of Section 2935.14, Revised Code, which provides that accused must be furnished facilities to communicate with an attorney or other person for the purpose of obtaining an attorney.

(No. 38753—Decided June 30, 1965.)

APPEAL from the Court of Appeals for Lucas County.

On or about November 8, 1961, John J. Dietz, appellant, was arrested by the police of the city of Toledo, appellee. He was charged with the offense of operating a motor vehicle within the city limits of Toledo while under the influence of intoxicating liquor, contrary to the ordinance.

The cause was set for trial in the Toledo Municipal Court at 9:00 a.m., January 23, 1962. At 9:15 a.m. on the same day, the appellant presented in open court a motion to suppress the evidence arising from a Harger drunkometer test given to the appellant by the police officers at the time that he was booked at police headquarters.

In addition to his motion to suppress, appellant claimed further that his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, Section 10, Article I of the Constitution of the state of Ohio, and Section 2935.14 of the Revised Code were violated.

The court took the matter of the disposition of the motion under advisement and later overruled the motion.

After the conclusion of the taking of testimony and argument of counsel, the cause was submitted to the jury under instructions by the trial court. The jury returned a verdict of guilty, and upon this finding judgment was entered and sentence imposed.

Upon appeal to the Court of Common Pleas, the judgment of the trial court was affirmed.

The Court of Appeals for Lucas County affirmed the judgment of the Common Pleas Court.

The cause is now before this court for final disposition on an appeal as of right and upon allowance of appellant's motion to certify the record.

Mr. Louis R. Young, director of law, and *Mr. John A. DeVictor, Jr.,* for appellee.

Messrs. Green & Green and *Mr. Merritt W. Green, II,* for appellant.

HERBERT, J. Appellant claims that he was compelled to be a witness against himself; that he was denied "due process" and assistance of counsel, contrary to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; and that he was denied the protection of Section 2935.14 of the Revised Code, which provides in part:

> "If the person arrested is unable to offer sufficient bail * * * he shall * * * be speedily permitted

facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel * * *."

The evidence discloses that on the night prior to his arrest the appellant gave an election "party" at his place of business, which lasted all night and until about 7:30 the next morning. His foresight caused him to make arrangements to take care of any of his guests who might overindulge in intoxicating liquors which were in plentiful supply. At about 10:30 a.m. on the same day, while appellant was driving his automobile, it ran through a number of warning cones placed on the street, struck a wood chipper and slid into a dump truck. The arresting officers noted evidence of intoxication of appellant. Upon arrival at police headquarters appellant was asked whether he would submit to a drunkometer test. The drunkometer is a machine to which is attached a balloon-like container into which the subject emits his breath. The breath is then exposed to certain chemicals, and the reactions within the machine automatically give a reading indicating the alcoholic content in the blood stream.

The appellant was assured that he was not required to submit to the test; that it was entirely his choice; that he was not required to answer any question; and that if he did the answers might be used against him. The appellant had about $3,000 on his person—far more than was necessary for bail.

He asked permission to telephone his lawyer but was told that as soon as the "booking" was completed he could do so. After some hesitation he decided to take the drunkometer test, after asserting that he had had nothing to drink, at least not for four hours. The jury was justified by the evidence in concluding that appellant voluntarily

submitted to the drunkometer test, which did indicate that appellant was intoxicated. One of the police officers called appellant's brother and notified him.

The Toledo Police Department operates under a procedure whereby an intoxicated person is detained four hours or until it is safe to release him.

Appellant was released on bail under this rule.

The Fifth Amendment in part provides that no person "shall be compelled in any criminal case to be a witness against himself." There is substantial evidence that appellant was under no compulsion. His decision to take the drunkometer test was voluntary. His conversation with the officers was free of any compulsion and after his right to refuse to answer was fully explained. Not more than fifteen minutes elapsed while he was in the presence of the arresting officers in the police station.

We are of the opinion that the following principle stated in *Jackson v. Denno, Warden* (decided June 22, 1964), 12 L. Ed. 2d 908, 915, was adhered to.

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers v. Richmond,* 365 U. S. 534, 5 L. Ed. 2d 760, 81 S. Ct. 735, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York,* 324 U. S. 401, 89 L. Ed. 1029, 65 S. Ct. 781; *Stroble v. California,* 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599; *Payne v. Arkansas,* 356 U. S. 560, 2 L. Ed. 2d 975, 78 S. Ct. 844 * * *."

Appellant complains that he asked to be allowed to confer with his lawyer over the telephone but was denied this privilege. That statement is correct. However, the officer did call appellant's brother. Certainly it may be

assumed that the brother would take appropriate steps in behalf of appellant.

The provisions of Section 2935.14 of the Revised Code were fully respected.

An examination of the record tends to prove that the appellant voluntarily submitted to the drunkometer test; that no coercion was used upon him; that no confession was obtained from him; that a police officer telephoned appellant's brother; and that the brief interrogation did not prejudice appellant.

There appearing to be no error prejudicial to the appellant in the record, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, SCHNEIDER and BROWN, JJ., concur.

DISSENTING OPINION.

O'NEIL, J., dissenting. This is a classic case of denial of counsel by police authority which could happen to any ordinary citizen at any time. The defendant was not a criminal. He was a businessman.

I dissent from the holding of the majority of the court for the following reasons: (1) Defendant was denied the assistance of counsel guaranteed him by Section 2935.14, Revised Code; (2) defendant was denied the assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution as made obligatory upon the states through the Fourteenth Amendment; (3) the evidence in question, the results of the drunkometer test, was unlawfully obtained by virtue of the denial of the rights granted by the statute and the Constitution and the motion to suppress such evidence which was timely filed should have been granted.

Section 2935.14, Revised Code, provides in part:

"If the person arrested is unable to offer sufficient bail * * * he shall, prior to being confined * * * be *speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel.* * * *" (Emphasis added.)

The opinion of the majority states at page 4:

"Appellant complains that he asked to be allowed to confer with his lawyer over the telephone but was denied this privilege. *That statement is correct.* However, the officer did call appellant's brother. Certainly *it may be assumed* that the brother would take appropriate steps in behalf of appellant. (Emphasis added.)

"The provisions of Section 2935.14 of the Revised Code were fully respected."

This interpretation of the statute has effectively deprived one accused of crime (a misdemeanor, the violation of an ordinance) of the right to confer with counsel. Section 2935.14, Revised Code, clearly requires that an individual be allowed to make his own telephone call to the attorney or other person of his choice, prior to his confinement.

Notwithstanding the fact that defendant could have offered sufficient bail in monetary terms, he could not be released, since the offense with which he was to be charged was not bailable for a four-hour period after arrest. In this sense, he was unable to offer "sufficient bail" within the meaning of the statute, and was entitled to consult with his attorney.

Not only was defendant denied his statutory right, but he was also denied the right to counsel granted him under the Sixth and Fourteenth Amendments to the United States Constitution. *Escobedo v. Illinois,* 378 U. S. 478;

Doughty v. Maxwell, Warden, 376 U. S. 202; *Gideon v. Wainright, Dir.,* 372 U. S. 335; *Carnley v. Cochran, Dir.,* 369 U. S. 506.

In *Escobedo v. Illinois, supra,* at page 490, the Supreme Court of the United States said:

> "* * * where * * * the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not *effectively* warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment.'" (Emphasis added.)

This holding is applicable to the instant case. At the time he was induced to take the test, the process had already turned from investigatory to accusatory. The record shows that defendant twice asked to be allowed to consult with his attorney. He was told that it was not necessary since the drunkometer test was voluntary, and since he did not have to answer any questions. Other than that, his rights were not effectively explained to him.

A police sergeant testified that he had no knowledge of the right of defendant to an attorney, that in his opinion the police could interrogate as long as they wished before charging an accused formally, and that the right to counsel attached only after the accused had been formally charged. Another officer testified that he was aware of the right of defendant to consult with his attorney, but did not permit him to do so. This is a violation of *Escobedo, supra.*

The action taken by the police was not only in violation of the rights of defendant, but was prejudicial to him since the evidence so obtained was material to his conviction. Defendant agreed to take the drunkometer test only after he had been refused the right to call his attorney, not once, but several times, and after he was promised that when he had taken the test, he could make the call. When he had taken the test, he was immediately locked up and was not permitted to make the call as promised.

To condition the granting of the rights of the accused upon compliance with the demands of the police officers is a coercive method of extracting evidence from him.

The evidence in question was gained illegally as a result of the violation of both statutory and constitutional rights of the defendant. It can not be said that the violations of his rights were waived by the taking of the test, since it was because of those violations that he was induced to take it. Furthermore, the taking of the test may at best be characterized as mere submission to authority since the defendant, who had had no previous experience in this area, was effectively within the power of the officers.

Evidence illegally obtained is inadmissible in a criminal trial, and the motion to suppress should have been granted. *Mapp v. Ohio,* 367 U. S. 643.

Therefore, the judgment should be reversed.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO.

This cause, here on appeal from the Court of Appeals for Lucas County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant costs herein expended; that a mandate be sent to the Toledo Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

OHIO REVISED CODE SECTION 2935.20, EFFECTIVE NOVEMBER 1, 1965.

SUBSTITUTE HOUSE BILL NO. 471.

To Enact Section 2935.20 Revised Code, Relative to Right of One Who is in Custody to be Visited by an Attorney.

After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be permitted forthwith facilities to communicate with an attorney-at-law of his choice who is entitled to practice in the Courts of this State, or to communicate with any other person of his choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be visited immediately by any attorney-at-law so obtained who is entitled to practice in the Courts of this State, and to consult with him privately. No officer or any other agent of this State shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation provided for by this Section.

Whoever violates this Section shall be fined not less than $25.00 nor more than $100.00 or imprisoned not more than thirty days, or both.

Passed: July 15, 1965
Approved: July 31, 1965
Effective: November 1, 1965.

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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 615.

JOHN J. DIETZ,
Petitioner,

vs.

CITY OF TOLEDO, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

JOHN A. DEVICTOR, JR.,
Assistant Director of Law,
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Chief Counsel,
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Attorneys for Respondent.

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CITY OF TOLEDO, OHIO,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

INTRODUCTION.

The petitioner, John J. Dietz, was found guilty of driving under the influence of intoxicating liquor in violation of Section 21-6-9 of the Toledo Municipal Code by a jury in the Municipal Court of the City of Toledo, and sentenced accordingly. This judgment and sentence was appealed to the Common Pleas Court in Lucas County, Ohio, and subsequently to the Court of Appeals of Lucas County. Both tribunals affirmed the lower court. The petitioner thereupon filed his notice of appeal to the Supreme Court of the State of Ohio which, in turn, sustained his motion to certify the record of the court below, and the cause was then heard by said Court on the merits, which again affirmed the lower Court. The opinion is reported in 3 Ohio State 2d at page 30.

STATEMENT OF FACTS.

The evidence at the trial shows that the petitioner was a successful business man, and that he gave a party, at which intoxicating liquor was served, which party started at approximately 9 P. M. on the 7th day of November, 1961, and continued on to about 7:30 A. M. on the 8th day of November, 1961. That the petitioner on the 8th day of November, 1961, at about 10:42 A. M., while operating his automobile within the city limits of Toledo, Ohio, ran through a number of warning cones placed on the street, struck a wood chipper, and slid under a dump truck, and made no attempt to avoid the accident. As soon as practicable, he was taken to the City of Toledo jail where he was interrogated, which took approximately fifteen minutes altogether. During the interrogation and before he submitted to a drunkometer test he was fully advised of his constitutional rights, that he did not have to answer any question if he did not wish to do so, as any statements made by him could be used against him.

During the course of interrogation, the petitioner was asked if he would be willing to take the Harger Drunkometer Test, and was advised that he did not have to take it if he did not want to, as the result could be used against him. The petitioner then asked if he could call his attorney. At no time was the petitioner told he could not do so and when it became obvious to the petitioner that the officer was going to book him and not release him, then he voluntarily agreed to take the drunkometer test. He had previously been advised that he could make his phone call right after he was booked. The record is quite clear that the petitioner was fully advised of his rights, that no duress or physical force was used upon him, and that he alone made the decision to take the drunkometer test rather than wait and call his attorney for reasons of his own.

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED.

1. Petitioner Was Not Denied His Constitutional Right to Confer With His Attorney.

The delay in denying request of petitioner to call his attorney was not unreasonable. In the matter of a person's right to confer privately with his counsel, the Ohio Rule and the general rule seems to be that a person has such right *at all reasonable times.* (Emphasis added.) This is the rule as stated in *Snook vs. State,* 34 O. App. 60, 77.

It is also stated by the Supreme Court of Ohio in *Sheppard vs. Koblentz,* 174 O. S. 120 at p. 123:

> "To show an abuse of discretion, it is necessary to show more than an error of judgment; rather it is necessary to show an act that is fostered by perversion of will, passion or prejudice."

In our case at hand the petitioner was interviewed for a total of only fifteen minutes. This does not compare with the numerous cases on this question in which hours, days, and even weeks are involved.

The police officers have certain procedures that they are required to follow in order to adequately carry out their duties. For a driving under the influence case such as this one, they have a form that they are required to complete. Before asking the questions of the offender, they explain to him that he does not have to answer the questions, and that if he does, the answers can be used against him. They then proceed to complete the form according to the answers given to them. One of the questions asked is whether or not the defendant is willing to submit to a drunkometer test. If the defendant refuses to answer any of the questions, it is marked on the form that he did such. This same procedure was followed in

the case now before the Court. Surely the petitioner is not contending that the police officers do not have a right to ask questions of him after advising him he does not have to answer.

Let us take for an example that a defendant at the scene, where he is being arrested, asked to call his attorney. Does this mean that the police must immediately take him to a telephone before they can talk with him, observe him, or even take him to the police station? To answer this in the affirmative would be to make an unreasonable and unworkable task for the arresting officers. As long as the defendant is given a reasonable time to contact his attorney, no constitutional rights have been violated. Fifteen minutes cannot be deemed to be unreasonable.

The Court will recognize that the Harger Drunkometer is widely used throughout the nation and is a device to determine accurately the percentage of alcohol by weight in the system. It is an attempt to resolve the question of whether a person is under the influence of alcohol on a scientific basis. Everyone knows that alcohol does oxidize and that any lapse of time brings on a greater oxidization of alcohol in the system. Consequently, any delay in administering the test detracts from its accuracy. In such a situation, a request for counsel before deciding whether to take the test can easily become a dodge by the accused to bring about delay and thus lessen the chances for his conviction. We believe the Court can see the danger in adopting a doctrine which could easily allow interminable delay in administering the test.

While the respondent feels that the case of *Mapp vs. Ohio,* 367 U. S. 643, has no relation to this matter now before the Court as there is no illegally seized evidence involved, it is to be noted that the Court in that case at

page 653 reaffirmed *United States vs. Robinowitz,* 339 U. S. 56, in which it was held that:

> "What is a reasonable search not prohibited by the Fourth Amendment is not to be determined by any fixed formula and that what is a reasonable search not prohibited by the Fourth Amendment is in the first instance for the trial court to determine."

In our case at hand the trial court apparently felt there was no unreasonableness involved as the motion to suppress and objections made by the defendant regarding the drunkometer test were all overruled. The trial court stated as follows regarding this matter at page 9 of the transcript:

> "Motion is not timely made, and, secondly, the word 'cajoling' as used in the motion even if proven would not constitute grounds for suppression unless the evidence might indicate that there was duress or something of that sort which would cause him to take the test, physical force or duress."

The evidence does not indicate any of the above.

2. Petitioner Waived His Right to Counsel.

The facts of our case at hand are such that the defendant was a successful businessman, knew of his right to obtain counsel, knew the nature of the charge against him, and knew the purpose of the drunkometer test, and he still agreed to voluntarily submit to it. The record clearly shows that no duress or physical force was used on the defendant before he agreed to take the test. From these facts it is obvious that the defendant knowingly and intelligently, without duress, waived his right to counsel. There are a great many cases in which a defendant has waived his right to counsel and then pleaded guilty to a serious crime. If this is so, surely the petitioner here can

waive his right to counsel and voluntarily submit to a drunkometer test. That a defendant can waive his right to counsel has been recognized by the Supreme Court of the United States in *Betts vs. Brady,* 316 U. S. 455 at pages 464 and 465, where it is stated:

> "We have construed the provision (Sixth Amendment to the U. S. Constitution) to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, *and where the right has not been intentionally and competently waived.*" (Emphasis and parenthesis added.)

The doctrine that a defendant can waive his right to counsel is also upheld by the case of *Escobedo vs. Illinois,* 378 U. S. 478. The Court in its opinion stated at page 483:

> "Mr. Cooper (the Assistant State's Attorney) testified that he did not advise petitioner of his constitutional rights, and it is undisputed that no one during the course of the interrogation so advised him."

and again stated at page 485:

> "Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement."

The above facts undoubtedly had a lot to do with the decision that the Court came to in that case. In fact it was so stated by the Court in its opinion at pages 490 and 491 where it is stated as follows:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied

> an opportunity to consult with his lawyer, *and the police have not effectively warned him of his absolute constitutional right to remain silent,* the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment * * *.'" (Emphasis added.)

It is undisputed in the case now before the Court that petitioner was fully advised of his constitutional right to remain silent and also of his constitutional right not to take the drunkometer test. Under these facts, there can be no doubt that he voluntarily submitted to the test and waived his right to counsel.

3. Petitioner Was Not Denied Any Constitutional Right Under the Recent Decisions of the Supreme Court of the United States.

The United States Supreme Court has made several recent decisions regarding the right of an accused to confer with legal counsel. In what must still be considered the leading case of the Supreme Court of the United States in regard to this matter, *Crooker vs. The State of California,* the Court stated the rule as follows, 357 U. S. 433, 439; 78 S. Ct. 1287, 1291:

> "The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. That right, secured in State prosecutions by the 14th Amendment guarantee of due process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to a *'fair opportunity' to secure counsel of his own choice.*
>
> "Under these principles, State refusal of a request to engage counsel violates Due Process not only if the

> accused is deprived of counsel at trial on the merits, but also if he is deprived of counsel for any part of the pre-trial proceedings, *provided that he is so prejudiced thereby* as to infect his subsequent trial with an absence *of 'that fundamental fairness essential to the very concepts of justice.'* " (Citations omitted.) (Emphasis added.)

The case most relied on by petitioner is *Escobedo vs. State of Illinois, supra.* However, as pointed out previously in this brief the *Escobedo* case is not controlling on the facts of this case now before the Court. The rule as stated by the *Crooker* case was not changed by the *Escobedo* case and in fact the Court so stated in the *Escobedo* case at pages 491 and 492 when it stated the following:

> "Among the critical circumstances which distinguished that case (the *Crooker* case, *supra*) from this one are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to 'say anything' in response to the questions."

There can be no question that in our case at hand the petitioner was advised several times that he did not have to take the test if he did not wish to and that the decision was his. With this knowledge, he decided to go ahead and submit to it. In view of this the *Escobedo* case, *supra,* has no bearing on the case now before the court.

Further, the Supreme Court of Ohio in *McQueen vs. Maxwell,* 177 O. S. 30, made a distinction from the *Escobedo* case, *supra,* in which it stated the following:

> "This case presents an issue entirely different from the one in *Escobedo vs. Illinois.* The question raised and disposed of in *Escobedo* related to the right of an accused to consult with *previously retained counsel*

during the course of his interrogation." (Emphasis added.)

As the facts in this case are clearly in conflict with those in the *Escobedo* case, they should not be used as the basis to clarify the decision in the *Escobedo* case.

CONCLUSION.

The petitioner was not denied his constitutional right to confer with his attorney as the fifteen (15) minute delay was not unreasonable and also because he intentionally and knowingly waived his right to counsel. Also, this case is not in conflict with the ruling in the *Escobedo* case as petitioner was definitely advised of his right not to take the Harger Drunkometer test before he voluntarily submitted to it.

For the reasons stated, we respectfully request that the writ of certiorari be denied and that the decisions of the lower courts be affirmed.

Respectfully submitted,

JOHN A. DEVICTOR, JR.,
JOHN J. BURKHART,
Attorneys for Respondent.

END